LIM GUAN ENG

v.

PUBLIC PROSECUTOR & OTHER APPEALS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CRIMINAL APPEAL NOS: M-05-34 & 35 OF 97
& M-31 & 32 OF 97]
21 APRIL 1998

CRIMINAL PROCEDURE: *Judgment - Double judgment - Draft judgment followed by written judgment - Whether 'deraf keputusan' amounted to a judgment - Judgment erroneously dated - Consequence - Whether trial judge should avoid recording reasons for oral judgment - Whether should only pronounce orders*

CRIMINAL PROCEDURE: *Judgment - Written judgment - Containing criticisms of counsel - Whether proper - Whether should be expunged - Whether criticisms in judgment affected propriety of trial*

CRIMINAL LAW: *Printing Presses and Publications Act 1984, s. 8A(1) - Ingredients - Proof - Publication - Falsity - Reasonable measures - Whether to apply subjective or objective test - Appropriate punishment*

EVIDENCE: *Corroboration - General principles - Convicting upon uncorroborated evidence - Exceptions - Evidence that requires corroboration - What constitutes corroboration - Warnings*

CRIMINAL LAW: *Sedition Act 1948, s. 4(1)(b) - Section 3(1)(c) - Administration of justice - Criticisms of judges and judgments - Criticisms against Attorney General - Appropriate punishment*

CRIMINAL PROCEDURE: *Sentence - Adequacy of sentence - Alternative sentences - Imposition of fine - Imprisonment - Appropriateness - Judicial discretion*

There were four appeals before the instant court. The first two were by the appellant against his conviction and sentence on charges under s. 8A of the Printing Presses and Publications Act 1984 ('the PPPA') and s. 4(1)(b) of the Sedition Act 1948 ('the SA'). The two other appeals were by the Public Prosecutor against the inadequacy of the sentence of fine passed upon the appellant.

The appellant is the Member of Parliament for Kota Melaka, the Deputy Secretary-General of the Democratic Action Party ('the DAP') and the National Chairman of the DAP Youth. Tan Sri Rahim Tamby Chik ('Rahim') was the former Chief Minister of Melaka. Although Rahim was charged with sexual offences involving a minor ('the minor'), based on the decision of the Public Prosecutor that evidence was inadequate, the charges against Rahim were withdrawn. The minor however was detained by the police and eventually placed in protective custody.

The appellant, being dissatisfied with the decision of the Public Prosecutor, published a pamphlet intimating a gathering to be held. One of the topics stated in the said pamphlet was "The Tan Sri Rahim Tamby Chik Sex Scandal, Wither Justice And Women's Right, Victim Imprisoned, Criminal Free."

The words "Mangsa Dipenjarakan" ('Victim Imprisoned') was the subject matter of the first charge against the appellant, the allegation being that these words amounted to false news that had been maliciously published by the appellant contrary to s. 8A(1) of the PPPA.

At the said gathering, it was alleged that the appellant had made certain speeches that became the subject matter of the second charge against the appellant, the allegation being that he had committed sedition contrary to s. 4(1)(b) of the SA.

On the first day of the trial, an exchange took place between the trial judge and counsel for the appellant ('KS') who had arrived in court 22 minutes late. KS remarked that he would not be cowed by the court.

The appellant was convicted on both charges and in his written judgment, the trial judge made certain adverse remarks about KS, in particular his conduct an his remark that he would not be cowed by the court. Although the trial judge delivered a draft judgment dated 28 April 1997, his written judgment was dated 28 February 1997.

The appellant appealed against his conviction and sentence on the following grounds, ie: (i) that the judge had produced two grounds of judgment namely his draft judgment dated 28 April 1997 and the written judgment dated 28 February 1997; (ii) that the trial had been vitiated by reason of the criticisms made against counsel for the appellant by the trial judge in the written grounds of judgment; (iii) that the prosecution had failed to prove the second ingredient constituting an offence under s. 8A of the PPPA, namely, that the words "Mangsa Dipenjarakan" or "Victim Imprisoned" were false; and (iv) that the words allegedly uttered by the appellant at the gathering were not proved as the evidence of the witness (PW2) had not been corroborated as required by s. 6(1) of the SA, and that there was a conflict within the evidence of the witness PW14.

Held:
Per Gopal Sri Ram JCA

[1] The date appearing on the written judgment was an obvious typographical error that occasioned no miscarriage of justice whatsoever. The reference to "deraf keputusan" by the trial judge was obviously a reference to the points he jotted down when delivering his oral reasons for finding the appellant guilty. These notes did not amount to a judgment in the sense in which it is used by the Courts of Judicature Act 1964, the Criminal Procedure Code and the Rules of the Court of Appeal 1994 which primarily govern adjectival criminal law. The judgment of the trial judge was, without doubt, the full written reasons he furnished to the parties after notices of appeal had been lodged and which was erroneously dated 28 February 1997.

[2] The trial judge should not have made the comments regarding his exchange with KS. However, it had in no way affected the propriety of the trial.

[3] To establish a case under s. 8A of the PPPA, the prosecution must establish: (i) that there is a publication of news; and (ii) that the news so published is false, in the sense that it is factually untrue. Upon proof of these two ingredients the existence of the third ingredient, ie, that there is malice, is to be presumed to exist in the absence of evidence that the person accused of the offence took reasonable measures to verify the truth of the news.

[3a] The test to be applied in a case under s. 8A(1) of the PPPA is that of the ordinary man in the street who accepts words in the sense in which they are ordinarily used. He has no specialised knowledge upon the subject to which the words relate and has in his possession only such general information as is available to all and sundry.

[3b] The words complained of 'Mangsa Dipenjarakan' were untrue because the minor had never been imprisoned.

[3c] The appellant knew that the words complained of were false, and on the totality of the evidence available, the appellant was actuated by actual malice in publishing the words "Mangsa Dipenjarakan."

[4] Evidence that requires corroboration: (i) must first be capable of belief before any question of corroboration may arise, for evidence that falls of its own inanition cannot be saved by the presence of abundant corroboration; (ii) cannot corroborate itself, for tainted evidence does not remove its taint by repetition, notwithstanding s. 157 of the Evidence Act 1950; and (iii) cannot be corroborated by evidence that itself requires corroboration;

[4a] At common law, a trial court is entitled to act upon uncorroborated evidence which in itself requires corroboration provided that it warns itself of the danger of so acting. The warning must not amount to mere lip-service. Good reasons must be furnished for departing from the accepted rule. Departure from the normal rule may be justified where the evidence requiring corroboration emanates from a witness who is a person of high character and the offence is one that does not carry with it any serious moral stigma.

[4b] The evidence of PW2 was confirmed in material particulars. What was of critical importance in this case was that the evidence presented passed the dual test of credibility and corroboration.

[5] A trial court is at liberty to pick or choose any piece of evidence from a witness. In evaluating the evidence of PW14 the trial judge had taken into account all relevant considerations. There was therefore judicial appreciation by the trial judge of the evidence led in support of the charge.

Per curiam:

[1] The public pillorying of the Attorney-General for exercising any of his powers under art. 145(1) of the Federal Constitution in one way rather than another would fall squarely within the purview of s. 3(1)(c) of the SA. To allege double standards against the Public Prosecutor in deciding which cases ought to be brought before the courts amounts to denigrating and undermining the administration of criminal justice.

[Appellant's appeals dismissed; respondent's cross-appeals allowed; sentence enhanced to 18 months' imprisonment on each charge.]

Cases referred to:

A-G v. Times Newspapers Ltd [1974] AC 273 ***(refd)***

Arulpragasan Sandaraju v. Public Prosecutor [1996] 4 CLJ 597; [1997] 1 CLJ 686 ***(refd)***

Bhuboni Sadhu v. King Emperor AIR [1949] PC 257 ***(refd)***

Chao Chong v. Public Prosecutor [1960] MLJ 238 ***(refd)***

Dowse v. A-G [1961] MLJ 249 ***(refd)***

Habee Bur Rahman v. Public Prosecutor [1971] 2 MLJ 194 ***(refd)***

Hj Abdul Ghani Ishak & Anor v. Public Prosecutor [1981] 2 MLJ 230 ***(refd)***

Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 ***(refd)***

Jegathesan v. Public Prosecutor [1980] 1 MLJ 165 ***(refd)***

Khoo Hi Chiang v. Public Prosecutor [1994] 2 CLJ 151 ***(refd)***

Lim Kit Siang v. Public Prosecutor [1980] 1 MLJ 293 ***(refd)***

Loo Pang v. Ng Chye [1974] 2 MLJ 193 ***(refd)***

Lorraine Phylis Cohen v. Public Prosecutor [1989] 2 CLJ 131 ***(refd)***
M Ratnavale v. S Lourdenadin [1988] 2 MLJ 371 ***(refd)***
Mohamed Ali v. Public Prosecutor [1962] MLJ 230 ***(refd)***
Public Prosecutor v. Datuk Hj Harun Hj Idris [1977] 1 MLJ 15 ***(refd)***
Public Prosecutor v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
Public Prosecutor v. Mark Koding [1983] 1 MLJ 111 ***(refd)***
Public Prosecutor v. Ooi Kee Saik & Ors [1971] 2 MLJ 108 ***(refd)***
Public Prosecutor v. Paneerselvan & Ors [1990] 2 CLJ 833 ***(refd)***
Public Prosecutor v. Thavananthan [1994] 2 MLJ 436 ***(refd)***
R v. Baskerville [1916] 2 KB 658 ***(refd)***
Re Sarbadhicary [1906] 95 LT 894 ***(refd)***
Syed Abu Bakar Ahmad v. Public Prosecutor [1984] 1 CLJ 80 ***(refd)***
Teng Ser Siong v. Public Prosecutor [1963] MLJ 265 ***(refd)***
TN Nathan v. Public Prosecutor [1978] 1 MLJ 134 ***(refd)***
Yap Ee Kong & Anor v. Public Prosecutor [1981] 1 MLJ 144 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 157
Federal Constitution art 145(1)
Printing Presses and Publications Act 1984, s. 8A
Sedition Act 1948, ss. 2, 3(1)(c), 4(1)(b), 6(1)
Women and Girls Protection Act 1973, s. 8(2), (4)

For the appellant - Karpal Singh (J Amardas, Jagdeep Singh Deo & Gobind Singh Deo with him); M/s Karpal Singh & Co
For the respondent - Azahar Mohamed, Yusof Zainal Abidin & LC Tay

[Appeal from High Court, Melaka; Criminal Case No: 45-2/95 & 45-3/95; [1998] 2 CLJ 623]

Reported by Ling Hea Hoon

JUDGMENT

Gopal Sri Ram JCA:

Preliminary

These four appeals came before us on 1 April 1998. Two of them were by Lim Guan Eng whom we shall, throughout this judgment, refer to as "the appellant". The first of these was directed against the conviction and sentence on a charge under s. 8A of the Printing Presses and Publications Act 1984 ("the PPPA"). The second was directed against the conviction and sentence upon a charge under s. 4(1)(b) of the Sedition Act 1948. The other two appeals were by the Public Prosecutor who complained that the sentence passed upon the appellant in respect of each proved offence was inadequate. Although the appeals by the Public Prosecutor were lodged earlier in point of time, we decided to hear the appellant's appeals first. Counsel for the appellant and the learned deputies who appeared for the respondent agreed to this course.

After carefully considering the arguments addressed to us, we dismissed the appellant's appeal against conviction and sentence, but allowed the respondent's cross-appeal. We set aside the sentence passed upon the appellant by the High Court on each charge. We then sentenced the appellant to 18 months imprisonment on each charge with effect from 1 April 1998, and ordered that these sentences do run concurrently. The reasons for our decision are as follows.

Facts And Background

The appellant is the Member of Parliament for Kota Melaka. He is a prominent political figure whose views command much influence over the Malaysian public. He is, and was at all material times, the Deputy Secretary-General of the Democratic Action Party (DAP), which is the political party that leads the Opposition in Parliament. He is also the National Chairman of the DAP Youth. These are positions of some importance.

Tan Sri Rahim Tamby Chik ("Rahim") was the former Chief Minister of the State of Melaka. He was charged with certain offences, the particulars of which are irrelevant for present purposes. However, the Public Prosecutor, after a consideration of the material before him came to the conclusion that there was inadequate evidence to proceed with the case against Rahim. Accordingly, the charges against Rahim were withdrawn and he was acquitted of them.

The case against Rahim attracted much publicity in the print and the electronic media. Wide publicity was also given to the allegation that Rahim had had sexual relations with a girl below the age of sixteen years. The truth of this allegation was never tested in a court of law. However, the Attorney General in his capacity of Public Prosecutor made a public statement to the effect that there was insufficient evidence to show that Rahim had committed any offence in relation to the girl in question.

Although the girl's name appears in the record of proceedings before us, we directed that it be not published. Henceforth we will merely refer to her as "the minor".

The evidence available on record shows that the minor was at one point in time detained by the police. But she was not, according to her own evidence, placed in a lock-up. She was subsequently placed in protective custody pursuant to an interim order made by the magistrate's court under s. 8(2) of the Women and Girls Protection Act 1973. There was then an attempt by her grandmother to have her set at liberty. However, the *habeas corpus* proceedings instituted for that purpose failed, the minor having filed an affidavit stating that she did not wish to be removed from the protective custody in which she had been placed. After the dismissal of the *habeas corpus* application, a final order was made under s. 8(4) of the aforesaid Act. We may add that this final order was made at the instance of the minor.

The appellant was unhappy with these events. He asked questions about them in Parliament. He was given answers to these questions. But he was still dissatisfied.

On or about 15 January 1995, there was published at his instance, 5000 copies of a pamphlet (exhs. P11 and P11B) which gave intimation of a gathering at the Emperor Hotel in the City of Melaka to be held on 19 January 1995. It was headed "Ceramah Kisah Benar". One of the topics upon which speeches were to be made at the gathering in question was described by the pamphlet in the following words:

The Tan Sri Rahim Tamby Chik Sex Scandal

Wither Justice And Women's Rights

Victim Imprisoned, Criminal Free.

The words "Mangsa dipenjarakan" ("Victim imprisoned") are the subject matter of the first charge against the appellant which alleged that these words amounted to false news that had been maliciously published by the appellant contrary to s. 8A(1) of the PPPA.

The gathering of which the pamphlet gave notice took place as scheduled. The appellant made a speech in which it is alleged that he said:

(1) that he was dissatisfied with the laws of Malaysia because of the double standard which resulted in the rape case involving Rahim not being brought to court and the Attorney General had stated that Rahim was not involved in a rape case involving the minor; and

(2) that he was dissatisfied with the fact that the court had ordered the minor to be detained for 3 years whereas Rahim, who should have been imprisoned for violating the law, was instead set free.

These two comments became the subject matter of the second charge against the appellant, the allegation being that he had committed sedition contrary to s. 4(1)(b) of the Sedition Act 1948.

There were about 300 persons present at the gathering. A preponderance of them were of the Malay community. Among those present were police officers assigned to monitor the gathering. They were PW2, 7, and 13. Encik Yew Kok Kee (PW14), the Publicity Secretary for the Melaka DAP and a member of the Melaka State Assembly was also present. It was this witness who had applied for and obtained a permit from the Police to hold the gathering.

Later, a police report was lodged. Investigations commenced. At their conclusion, the appellant was charged with committing the offences of which we spoke a moment ago.

After a trial lasting several days, Mohd Noor Abdullah J, in a reserved decision, delivered on 28 April 1997, found the appellant guilty on the first charge and sentenced him to a fine of RM10,000, in default six months imprisonment. On the second charge the judge found the first comment not to have been proved. He however found that the appellant had committed an offence in respect of the second comment. He entered a conviction against the appellant upon the second charge and imposed a fine of RM5,000, in default three months imprisonment. The appellant's appeals are directed at both convictions and the sentences passed upon him.

The Grounds Of Appeal

The appellant advanced several grounds of appeal before us. Some of these are common to both his appeals. Then there are the grounds that are specifically directed at each appeal. We will first address the common grounds.

First Common Ground: Two Judgments

It was argued by Encik Karpal Singh that the appellant's convictions on both charges ought to be set aside because the judge had produced two grounds of judgment. In order to appreciate the point made by counsel, it is necessary to advert to the relevant part of the proceedings before the judge.

Final submissions at the end of the whole case were completed on 28 February 1997. The trial judge then reserved his decision to 28 April 1997 on which day he delivered a draft judgment in point form. The points he made appear sufficiently from the appeal record. After convicting the appellant on both charges, the trial judge heard arguments in mitigation from the appellant and his counsel. He also heard arguments in reply from Encik Azahar Mohammed, the learned deputy public prosecutor who appeared at the trial and in these appeals. He then passed sentence. Thereafter, both the Public Prosecutor and the appellant lodged their respective notices of appeal within the time prescribed by the Rules of the Court of Appeal 1994. In June 1997, the parties received the written grounds of the trial judge. It is dated 28 February 1997 and was included in the appeal record.

Encik Karpal Singh of counsel for the appellant, relying on the foregoing chronology, argued that when the trial judge delivered his draft judgment on 28 April there was already in existence a written judgment dated 28 February. Once the judge had delivered a draft judgment on 28 April, it was not open to him to later issue the written judgment dated 28 February. It follows that the written judgment dated 28 February 1997 could not be relied upon by anyone. The only judgment which this court is entitled to consider is the draft judgment delivered in Open court on 28 April. That in essence is the submission of Encik Karpal Singh.

Counsel informed us that his efforts had not disclosed any reported case the facts of which are similar to the present instance. The only reported decisions concerned cases where a trial court had given a written judgment and then attempted to supplement that judgment by means of a later judgment. In this context we were referred to *Habee Bur Rahman v. Public Prosecutor* [1971] 2 MLJ 194 and *Cohen v. Public Prosecutor* [1989] 2 MLJ 288. It is noteworthy that in the latter case a formal application was made to expunge the offending supplementary grounds of judgment from the record. There was, of course, no such application in the present appeal. Counsel nevertheless argued that this court ought to make a ruling as to which judgment should be relied upon for the purposes of this appeal because his grounds of complaint would very much depend upon such a ruling.

The learned deputy, Encik Azahar Mohammed, when responding to the arguments of Encik Karpal Singh pointed out that the judgment dated 28 February could not have been in existence on that date because it adverts to matters that transpired after that date, in particular, the judge's consideration of the plea in mitigation by the appellant and his counsel which were only made on 28 April. The learned deputy also clarified that no judgment in draft had been delivered on 28 April. It was submitted on the respondent's behalf that the date appearing on the last page of the written judgment, namely, 28 February, is an obvious error. Our attention was also drawn to the grounds of appeal set out in the appellant's petition almost all of which directed criticism at the trial judge's conclusions appearing in the written judgment dated 28 February. There was, Encik Azahar submitted, no injustice occasioned to the appellant by the error in the date appearing in the written judgment.

After considering all the arguments, including those advanced by Encik Karpal Singh in his reply to the learned deputy, we agreed with the submissions advanced on behalf of the Public Prosecutor. It is clear, as argued by Encik Azahar, that it would have been physically impossible for the written judgment to have been prepared on 28 February 1997 in the form in which it now appears. The learned judge had not on that date heard any of the arguments advanced before him on 28 April. Yet, most, if not all of what was said and happened on 28 April appears in the written judgment. It is therefore quite plain that the written judgment could not have been in existence on 28 February 1997. We therefore concluded that the only judgment that was to be considered in this appeal would be that erroneously dated 28 February 1997.

We were also inclined to amend the date appearing on the written judgment to 28 April. Indeed, that was the order we first made at the conclusion of the arguments of the point taken by the appellant in the very first ground of his petition of appeal. However after hearing further arguments from Encik Karpal

Singh we agreed with him that our order may give rise to further difficulty because it may be argued, having regard to what the judge described as his "draft judgment", that there were two judgments both dated 28 April 1997. We therefore, at the suggestion of Encik Karpal Singh and with the agreement of the learned deputy, ruled that the judgment dated 28 February 1997 must have been written on some date after 28 April 1997.

Having regard to all the material available on record we were satisfied that the date appearing on the written judgment was an obvious typographical error that occasioned no miscarriage of justice whatsoever. We are equally satisfied from a careful scrutiny of the record of appeal that nothing really turns upon the note made by the learned judge on 28 April 1997 which refers to a "deraf keputusan" (literally meaning "draft decision"). What he was obviously referring to were the points he jotted down when delivering his oral reasons for finding the appellant guilty. These do not, in our opinion, amount to a judgment in the sense in which it is used by the Courts of Judicature Act 1964, the Criminal Procedure Code and the Rules of the Court of Appeal 1994 which primarily govern adjectival criminal law. The judgment of the trial judge in this case was, without doubt, the full written reasons he furnished to the parties after notices of appeal had been lodged and which was erroneously dated 28 February.

A perusal of the appellant's petition of appeal reveals that he had taken every point of criticism that was available to him against the reasoning expressed in the written judgment. We are therefore of the view that no prejudice whatsoever has been visited upon the appellant by reason of the matters complained of by him in this regard and that the convictions entered against him have in no way been vitiated by the error in the date appearing on the written judgment.

That said, we would express the view that great care must be taken by trial judges to accurately date their judgments to ensure that no confusion arises. Once properly dated, their judgments will render unnecessary, such arguments as those raised before us in the instant case. The trial judge in the present case unfortunately did not take sufficient care in ensuring that his written judgment bore the date on which it came into existence. We would also advise trial judges to avoid recording reasons, even in point form, for any oral judgment they may give at the conclusion of the case before them. Suffice that they pronounce the orders they propose to make. Once there is an appeal, the grounds of judgment may be prepared and furnished. While there is absolutely nothing wrong in recording short notes when delivering oral judgment as was done in the present instance, we find that it often provides room for the argument that prejudice has been occasioned because there are two judgments.

Second Common Ground: Criticism Of Counsel

Encik Karpal Singh has also argued that the appellant's trial has been vitiated by reason of certain criticism levelled against him by the trial judge in the written grounds of judgment. The matter arose in this way.

On the first day of the appellant's trial, the court convened at 9am. When the trial judge mounted the bench only those having conduct of the prosecution were present. A most reasonable suggestion by the learned deputy that the court adjourns to await the arrival of opposing counsel was, for some unknown reason, not acceded to by the trial judge. Then, at about 9.08am, the appellant arrived with Encik Amardas, one of Encik Karpal Singh's juniors in the case. The judge then proceeded to hear argument relating to the joint trial of the two charges against the appellant. At about 9.22am, Encik Karpal Singh arrived. What happened thereafter is not fully reflected in the notes taken by the trial judge. But it is common ground that an exchange did take place between Encik Karpal Singh and the judge which included an apology by counsel for his tardiness, a remark by the judge about the punctuality with which he sat, a response by counsel that even judges do not always sit on time and that he would not be cowed by the court. This last remark does not, however, appear in the judge's note. After this brief distraction the trial appears to have proceeded smoothly to its conclusion with no further reference to the exchange between counsel and the court. If matters had rested there, as they indeed ought to have, this court need not have been troubled by the present complaint. But they did not.

When the learned trial judge came to write his judgment he adverted to the incident. He made certain adverse remarks about the conduct of Encik Karpal Singh in relation to the exchange that had taken place. In particular he referred to the remark by counsel that he would not be cowed by the court. This is surprising because there was never at any time an indication from the trial judge that he did not intend to let the matter rest. On the other hand, the way in which the trial proceeded appears to indicate that the unfortunate episode was over and long forgotten. In these circumstances it was wrong for the trial judge to have borne the matter in mind and dealt with it in the way in which he did in his written judgment.

Before us Encik Karpal Singh argued that the criticism of him by the learned judge was not only unwarranted but had also vitiated the trial because the judge had acted without jurisdiction. While we agree that the criticism of counsel by the judge was certainly unnecessary and unwarranted, we are unable to accede to the submission of Encik Karpal Singh that it had the effect he says it did. Clearly, the comments made by the judge against counsel ought to be expunged from the record as lacking any proper basis. However, it has in no way affected the propriety of the trial.

We would add that on occasions such as the present we can do no better than to recall to mind the following observation of Sharma J in *Loo Pang v. Ng Chye* [1974] 2 MLJ 193, 194:

> I need only add that a reasonable and workable amount of harmony and goodwill, if not a complete accord and adjustment, ought to prevail between the Bench and the Bar and the mere fact that a presiding officer of the court whether he be a judge or a magistrate sits a few feet higher than the floor from which the counsel addresses him should make no difference in the attitude, duties and status of the two. Both of them are part of the same machinery of justice. Both of them are essentially men of law and presumably of honour, no doubt performing different functions but those functions are aimed at one and the same end and that is the administration of justice with dignity, courtesy and honour and these qualities should be seen and reflected in their respective conduct and behaviour. The Bench and the Bar both serve the public and the law which the public is expected to respect and honour. Those connected with the administration of law and justice should be so worthy as to command that respect and honour.

So much for the grounds of appeal that are common to the appellant's appeals. We now turn to address the complaints made in respect of each appeal.

The First Appeal

Section 8A of the PPPA with which the first appeal is concerned reads as follows:

> 8A(1) Where in any publication there is maliciously published any false news, the printer, publisher, editor and the writer thereof shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine not exceeding twenty thousand ringgit or to both.
>
> (2) For the purposes of this section, malice shall be presumed in default of evidence showing that, prior to publication, the accused took reasonable measures to verify the truth of the news.
>
> (3) No prosecution for an offence under this section shall be initiated without the consent in writing of the Public Prosecutor.

To establish a case under the foregoing provision the prosecution must establish (1) that there was a publication of news and (2) that the news so published was false, in the sense that it was factually untrue. Upon proof of these two ingredients the existence of the third ingredient, *viz.* (3) that there was malice is to be presumed to exist in the absence of evidence that the person accused of the offence took reasonable measures to verify the truth of the news.

Encik Karpal Singh has no quarrel about the first ingredient. He agrees that there was publication. But he argues that the prosecution had, at the trial, hopelessly failed to prove the second. In other words, it had not been proved beyond a reasonable doubt at the close of the case for the prosecution that the words "Mangsa dipenjarakan" or "Victim imprisoned" were false. It was further submitted that the trial judge had not construed the words complained of in the context in which they had been used. Counsel says that when the offending pamphlet is read as a whole it is clear that the appellant could not possibly have meant that the minor had been incarcerated in a prison. After all, the minor had been placed in police detention prior to the making of the protective custody order. Therefore, the words "Mangsa dipenjarakan" could be adequately construed to refer to the period when she (the minor) was under police detention. Encik Karpal Singh also complained that the trial judge had paid mere lip service to the test that fell to be applied in the proof of the second ingredient. There was, according to counsel, no proper appreciation by the judge of the majority judgments of the Federal Court in *Arulpragasam v. Public Prosecutor* [1997] 1 MLJ 1 and the earlier decision of the apex court in *Khoo Hii Chiang v. Public Prosecutor* [1994] 1 MLJ 265 which call for a maximum evaluation of the evidence led by the prosecution when determining whether the appellant had a case to answer. So much for the submissions advanced on the appellant's behalf.

In answer to these arguments, Encik Yusof Hj. Zainal Abidin, deputy public prosecutor, submitted that there had been no misdirection by the learned judge upon the proof of the second ingredient. He referred us to passages in the judgment which clearly show that the trial judge had not looked at the words complained of in isolation but contextually, having regard to the offending pamphlet as a whole. The learned deputy also drew our attention to that part of the judgment where the trial judge dealt with the standard of proof, in particular with reference to the decision in *Arulpragasam (supra)*. It was also submitted that so much of the prosecution's evidence that related to the first charge when read as a whole established the fact that the words complained of were false. The learned deputy further submitted that the prosecution had, both at the close of its case and at the end of the whole case established all the ingredients required to bring home guilt on the first charge.

After considering the arguments addressed to us, we found no merit in the submissions advanced on the appellant's behalf in support of the first appeal. It is clear from a reading of the judgment under appeal that the trial judge approached the words complained of in their proper context. He was careful in ensuring that the prosecution met the legal standard of proof. He analysed the evidence led in support of the first charge with care. He found that the words complained of were untrue because the minor had never been imprisoned. With these conclusions we are in agreement.

It must not be forgotten that the offending pamphlet was directed at all and sundry. In our judgment, the test that is to be applied in a case under s. 8A(1) is that of the ordinary man on the street. He is not one who habitually carries with him leading dictionaries of the Malay or the English language. He does not examine the words addressed to him by referring to such works. He is not a lawyer who is possessed of knowledge of technical terms. He is one who accepts them in the sense in which they are ordinarily used. He has no specialised knowledge upon the subject to which the words relate. He has in his possession only such general information as is available to all and sundry. The question then to be asked is: what would the words "Mangsa dipenjarakan" convey to such a man in their ordinary sense?

Adopting the approach that has commended itself to us, we are satisfied that, having regard to all the relevant circumstances of the case, including the context of their use, the words "Mangsa dipenjarakan" convey the meaning that the minor had been imprisoned despite her innocence. It is clear from the evidence of the prosecution that the minor had never been imprisoned and that even during her detention by the police, she was not kept in a lock-up. Indeed, the evidence of the appellant given while making his defence to the charge has, instead of raising a reasonable doubt, further strengthened the prosecution's case. For, the appellant, during his testimony, said that he was referring to the police detention of the minor, but not to the period of three years specified by the order of protective custody made by the magistrate. It follows, with respect, that the suggestion made by counsel for the appellant that the words complained of could be held not to be false by reason of the fact that the minor had for a time been detained by the police is without merit.

So far as the third ingredient is concerned, no evidence was led by the appellant at the trial to show that he took reasonable measures to verify the truth of the words complained of. On the other hand, the evidence on the first charge shows that the appellant, on the basis of the information in his possession, knew that the words complained of were false. Further, the facts established at the trial show that it was the appellant's intention to convey a false impression to the ordinary man on the street that the minor, though innocent, had been sent to prison. We are therefore satisfied that the totality of the evidence available on record supports the irresistible inference that the appellant was actuated by actual malice in publishing the words "Mangsa dipenjarakan".

To sum-up, we find ourselves in agreement with the approach adopted by the trial judge and with his conclusions in respect of the first charge. We are unable to find any misdirection by the judge of himself upon the law or the evidence. It is therefore our judgment that the first appeal, which relates to the conviction upon the first charge is without merit.

The Second Appeal

The second appeal is, as we earlier observed, directed at the appellant's conviction upon the charge of sedition under s. 4(1) of the Sedition Act 1948 the material portion of which, for present purposes, provides that: "Any person who – (b) utters any seditious words; (c) prints, publishes ... any seditious publication ... shall be guilty of an offence."

Section 2 defines seditious words when applied to or used in respect of any act, speech, words, publication as one having a seditious tendency. And s. 3(1) for present purposes reads: "A 'seditious tendency' is a tendency – (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State."

Encik Karpal Singh did not, during his address to us in support of the second appeal, submit that the words set out in para. (b) of the second charge, if proved, were not seditious. His arguments were confined to the proof of the words allegedly uttered by the appellant at the meeting of 19 January. There was accordingly no response from the learned deputy upon the question whether the words complained of, if uttered, were seditious. We are therefore spared the task of deciding the point since the issue was never raised before us. In any event the law upon the subject has been authoritatively stated by Raja Azlan Shah J (as he then was) in *Public Prosecutor v. Ooi Kee Saik & Ors* [1971] 2 MLJ 108 and by Mohamed Azmi J, (as he then was) in *Public Prosecutor v. Mark Koding* [1983] 1 MLJ 111. We find that there is no further learning that may be usefully added to what their Lordships said in those cases.

It is the submission of counsel that the words attributed to the appellant in the second paragraph of the sedition charge were not proved in accordance with the *Arulpragasan* test. As earlier observed, the trial judge found that the prosecution had failed to establish that the appellant had uttered words to the effect set out in the first paragraph of the second charge. There is no cross appeal by the Public Prosecutor against this finding by the judge. However, we find it necessary to express our views upon this aspect of the case by reason of certain comments made by the trial judge in his judgment which are certainly open to the interpretation that even if the words set out in the first paragraph of the second charge had been proved to have been uttered by the appellant, no offence under s. 4(1)(b) would be established. We must enter our vigorous dissent against that proposition.

In our judgment, **if** the words set out in the first paragraph of the second charge **had** been proved to have been uttered by the appellant, a case of sedition in respect of them would certainly have been established. This is because the words in question have the effect of bringing the administration

of justice into hatred and contempt. It would be quite wrong to assume that the administration of justice is confined to matters actually pending before a court of law. It includes steps that are necessarily antecedent to, and fairly connected with, the invoking of the court's process. To quote from the speech of Lord Diplock in *Attorney-General v. Times Newspapers Ltd.* [1974] AC 273, 309:

> The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law.

Thus, the public pillorying of the Attorney-General for exercising any of his powers under art. 145(1) of the Federal Constitution in one way rather than another would fall squarely within the purview of s. 3(1)(c) of the Sedition Act 1948. To allege double standards against the Public Prosecutor in deciding which cases ought to be brought before the courts (which is the thrust of the words in the first paragraph of the second charge) amounts to denigrating and undermining the administration of criminal justice.

With that we return to the primary submission of Encik Karpal Singh directed at the proof of the offence which forms the subject matter of the second charge.

Counsel argued that the learned judge was wrong in holding that the prosecution had proved its case against the appellant because: (1) there was no corroboration of the evidence of PW2; (2) there was material conflict between the evidence of PW2 and PW14 as to what the appellant is alleged to have said at the meeting of 19 January 1995; and (3) PW2, 7 and 12 were unreliable, their evidence having been rejected by the judge in respect of the first paragraph of the first charge. These points bring into focus the question whether there had been judicial appreciation of the evidence presented by the prosecution. We will deal with each of them in turn.

Appreciation Of Evidence: The Corroboration Point

The gist of PW2's evidence is that he attended the meeting in question and made a contemporary note of the proceedings at the meeting, including the appellant's speech. On returning to his office, PW2 typed out the notes he had taken. PW2 then destroyed the original note he had taken contemporaneously at the meeting. The typed document was put in and marked as exh. P6. The portion relating to the appellant's speech was marked as exh. P6A. PW7 and PW12 who had accompanied PW2 to the meeting essentially confirmed the material points in the speech made by the appellant set out in exh. P6A.

Encik Karpal Singh argued that in the absence of a tape recording, the evidence of PW2 ought not to have been accepted by the trial judge, particularly when that witness' account of what the appellant said was taken down in third person speech. Counsel very properly drew our attention to s. 6(1) of the Sedition Act 1948 which prohibits the conviction of any person for an offence under s. 4 on the uncorroborated evidence of one witness. He submitted that the evidence relied upon by the trial judge as corroborating the testimony of PW2 was not true corroboration in law. The argument of counsel raises an important question that calls for some discussion.

So far as the law governing corroboration is concerned, we accept the following propositions to be well settled and beyond controversy:

1. As a general rule, the conviction of an accused may proceed upon the uncorroborated evidence of one witness.

2. There are cases where either common law – as a matter of practice which has, through passage of time, acquired the force of law – or statute creates an exception to the general rule in respect of certain categories of witnesses by calling for, or indeed demanding, that their evidence may not to be acted upon in the absence of independent corroboration. Accomplices illustrate the common law exception, while s. 6(1) illustrates the statutory exception.

3. Evidence that requires corroboration, whether as a matter of practice having the force of law or by direction of statute:-

   (a) must first be capable of belief before any question of corroboration may arise, for evidence that falls of its own inanition cannot be saved by the presence of abundant corroboration;

   (b) cannot corroborate itself, for tainted evidence does not remove its taint by repetition, notwithstanding s. 157 of the Evidence Act 1950; and

(c) cannot be corroborated by evidence that itself requires corroboration.

4. To constitute true corroboration in the eyes of the law, the corroborative evidence must:

(a) be capable of belief;

(b) be independent in the sense mentioned in proposition 3(c) above;

(c) in respect of the fact or facts that lie at the axis of the dispute, that is to say, upon the fact in issue and not upon some collateral matter or upon a fact in respect of which there is no quarrel. In other words, it must be corroboration upon a material particular but need not be identically repetitive of the evidence that requires corroboration.

5. At common law, a trial court is entitled to act upon uncorroborated evidence which in itself requires corroboration provided that it warns itself of the danger of so acting. The warning must not amount to mere lip-service. Good reasons must be furnished for departing from the accepted rule. Departure from the normal rule may be justified where the evidence requiring corroboration emanates from a witness who is a person of high character and the offence is one that does not carry with it any serious moral stigma.

The authorities that support these propositions are legion and include, *R v. Baskerville* [1916] 2 KB 658, *Chao Chong v. Public Prosecutor* [1960] MLJ 238, *Teng Ser Siong v. Public Prosecutor* [1963] MLJ 265, *T. N. Nathan v. Public Prosecutor* [1978] 1 MLJ 134, *Jegathesan v. Public Prosecutor* [1980] 1 MLJ 165, *Dowse v. Attorney-General* [1961] MLJ 249, *Bhuboni Sahu v. King Emperor* AIR [1949] PC 257, *Mohamed Ali v. Public Prosecutor* [1962] MLJ 230, *Yap Ee Kong v. Public Prosecutor* [1981] 1 MLJ 144, *Public Prosecutor v. Paneerselvan & Ors* [1991] 1 MLJ 106 and more recently *Public Prosecutor v. Thavananthan* [1994] 2 MLJ 436.

In the present case, the trial judge held that the evidence of PW7 and 12 sufficiently satisfied the test laid down in *R v. Baskerville (ibid)*, a case that has been repeatedly applied by our courts. This, in our judgment, is a proper direction. Although these two witnesses (PW7 and 12) could not recall every word spoken by the appellant, they confirmed the evidence of PW2 in material particulars. This is sufficient corroboration in the eyes of the law.

True, as suggested by counsel for the appellant, it would have been ideal for there to have been a tape recording of the offending speech. But civil and criminal trials do not always have the benefit of evidence that is ideally presented. What is of critical importance in a case as the present is that the

evidence presented passes the dual test of credibility and corroboration. That is the way in which the judge appreciated the evidence of PW2, 7 and 12. In this he was entirely correct.

Appreciation Of Evidence: The Contradiction Point

PW14 was among the witnesses called by the prosecution. His evidence in chief was confined to the following matters. In December 1994 he attended a meeting at the office of the DAP at which the appellant announced his intention to hold the gathering in question. Later he received the pamphlet in draft from the appellant. Upon the appellant's direction, he placed an order with the printer for the production of 5000 copies of the pamphlet, exhs. P11 and P11B. He also applied for and obtained the requisite permit to hold the gathering in question. The answers elicited from this witness during his examination-in-chief demonstrate that the real purpose of the prosecution in calling this witness was to fill gaps in so much of its case as concerned the publication of the offending pamphlet and the convening of the meeting on 19 January 1995.

Under cross-examination this witness confirmed that he had been present at the gathering. He was referred to the two paragraphs in the second charge and asked if the appellant had spoken the offending words therein alleged. He said that the appellant had not.

Based on the evidence of PW14 under cross-examination, Encik Karpal Singh submitted that there was a serious conflict between the prosecution's own witnesses as to whether the appellant had uttered the offending words. On the one hand there was the evidence of PW2, 7 and 12 all of whom testified in support of the second charge. On the other hand there was the evidence of PW14 who directly contradicted them. The prosecution could not disavow the evidence of PW14 given under cross-examination. He was their witness and they were bound by his testimony, including that given under cross-examination. Additionally, the learned judge had not accepted the prosecution's evidence led in support of the first paragraph of the second charge. In this state of affairs it could not be said that the prosecution had met the standard of proof laid down by the Federal Court in *Arulpragasan (supra)*. So much for the arguments advanced on the appellant's behalf.

The submissions of counsel for the appellant once again raise the issue of appreciation of evidence, albeit from a different perspective. At hand, therefore, is the question whether the learned trial judge acted in accordance with the principles governing the judicial appreciation of evidence adduced before a court. If, as argued by counsel, the trial judge had failed to apply well established principles for the evaluation of evidence, such failure would constitute a misdirection warranting appellate intervention. See, *Syed Abu Bakar bin Ahmad v. Public Prosecutor* [1984] 2 MLJ 19.

Now, among the general rules that govern judicial appreciation of evidence in both civil and criminal causes in the adversarial system of justice there is one of fundamental importance. It is that a party is bound by the evidence of witnesses whom he calls in proof of his case. The rule is enforced with full rigour in civil cases. See *M. Ratnavale v. S. Lourdenadin* [1988] 2 MLJ 371.

However, the law, recognising that the much depends upon the human factor and vagaries of life, refuses to lay down any absolute rule in the matter of evidence evaluation. Witnesses are but human. Testimony may often be coloured by emotion, benign or malicious. Not all witnesses speak the whole truth, despite the oath or affirmation administered to them. Not all witnesses are devoid of bias of one sort or another. Recollection of events is seldom, if ever, perfect. Two or more persons witnessing the same incident may give varying, yet truthful, accounts of it according to their perception. There are so many other imponderables. The law would fail to meet the needs of society whose affairs it regulates if it does not take into account the incalculable variables that enter upon the scene when questions of appreciation of evidence arise.

In no case is this especially true as in the trial of criminal cases where the Public Prosecutor initiates the court's process in the public interest. The Public Prosecutor is often compelled to call witnesses to formally establish facts that are necessary for the unfolding of the story that lies at the heart of his case. Some of these witnesses may, by reason of close relationship or loyalty, exhibit a natural bias in favour of the accused. They may, out of eagerness to help the accused, furnish answers under cross-examination that are favourable to the defence and stretch the truth to the point of incredulity. If the general rule is applied with unbending strictness in such cases, substantial justice will not be achieved. The approach that is to adopted by a trial court in such cases appears in the judgment of Wan Yahya J, (as he then was) in *Haji Abdul Ghani bin Ishak & Anor. v. Public Prosecutor* [1981] 2 MLJ 230. His Lordship there said (at p. 232):

> It was submitted by Mr Edgar Joseph Jr counsel for the first accused, that his client had not been proved to have had any interest in the application; that the only direct evidence on this had come from Kipah and that she had stated in evidence that she was making the application at the behest of her uncle, the second accused. Counsel further submitted that as she was a witness called by the prosecution, this court should not reject her evidence. He stressed that the prosecution could not blow hot and cold at the same time and that the whole of her evidence had to be accepted in toto. Counsel referred to the Indian case of *Abinash Chandra v. Emperor* (1936) 37 Cr. LJ 439 and, in particular, to p. 442, which reads as follows:

> The Crown has suggested, though not in so many words, that we ought to look with suspicion upon the evidence of these witnesses because they belonged to a faction in the company which was not favourably disposed towards N.C. Chouduri. A more unusual and a more impossible suggestion, I have never heard advanced. These are witnesses produced by the Crown, and put forward as witnesses of truth in support of the case for the prosecution. It has not been suggested that they turned hostile, nor during the whole trial were they treated as hostile witnesses, nor has anyone openly suggested that they were not truthful witnesses. The prosecution cannot be permitted to blow hot and cold as best to suit them. If these were not truthful witnesses, they ought never to have been called by the prosecution and so recommended to the court as witnesses of truth.

This apparently stringent decision is not without qualification. One only has to read part of the following sentence which reads: 'There is no reason whatever for preferring the evidence of N.C. Chouduri to theirs ...' – to understand that in the above-quoted passage the learned judge was referring to the rule against rejection of prosecution witnesses' evidence when there is nothing to suggest contra preference against his evidence. Our present case is somewhat different. The witness Kipah is the wife of the first accused and she had to be called by the prosecution to fill up the chain of events in that case. Answers elicited from her cross-examination by the defence has to be scrutinised with some care. As a wife testifying in a serious case against her husband, she could not be expected to be entirely immune from being unbiased, or in any event, uninterested. Moreover, when there are other evidences to the contrary, this court is not bound to accept each and every word in her evidence. If what was suggested is to be followed in the unqualified form, the function of a trial judge or jury will become obsolete and such function could be better decided by computer. There is nothing to deter the trial judge or jury picking or choosing any piece of evidence from a witness while rejecting others which he or they felt not credible enough. After all a witness is capable of saying both truths and untruths. If, for any good reason, the court feels that part of his evidence should be preferred to the other, then it is at liberty to accept that part and reject the others. Indeed this has to be so when dealing with human as opposed to mechanical factors. That is partly why we are here to adjudge a case.

It is noteworthy that when the case went on appeal, the former Federal Court – unusually strong upon that occasion (Raja Azlan Shah CJ (Malaya), Abdul Hamid FJ and Hashim Yeop A. Sani J) – made no adverse comment on the methodology of evidence evaluation adopted by Wan Yahya J, in the passage quoted above.

In our judgment, the view expressed by Wan Yahya J, in *Haji Abdul Ghani bin Ishak & Anor. v. Public Prosecutor (ibid)* provides a complete answer to Encik Karpal Singh's submission on the point under discussion. The trial judge in the present case before us adopted a similar approach when evaluating the evidence of PW14. He took into account all relevant considerations, including this witness' bias in the appellant's favour, when deciding to reject the answers given under cross-examination. We are unable to discern any error in the trial judge's approach to the evidence led in proof of the second charge. In our judgment there was judicial appreciation by the trial judge of the evidence led in support of the second charge. The submission on the contradiction point therefore fails.

Reliability Of Prosecution Evidence

When considering the first paragraph of the second charge the learned judge concluded, after taking into account the appellant's evidence given in his defence, that the relevant prosecution witnesses may have been confused about what the appellant had said at the meeting in question. He then held that a case of sedition had not been made out in respect of the first paragraph of the second charge.

Encik Karpal Singh argued that once the judge found it unsafe to act upon the evidence of material witnesses for the prosecution in respect of the first paragraph of the second charge, the very same evidence became unreliable in respect of the second paragraph as well. He submitted that the judge was therefore wrong in acting upon the evidence of these witnesses with regard to the second paragraph.

In our judgment, these arguments are squarely met by the following observation of Raja Azlan Shah FJ (as he then was) in *Public Prosecutor v. Datuk Haji Harun bin Hj Idris* [1977] 1 MLJ 15, 19:

> There is no rule of law that the testimony of a witness must either be believed entirely or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinise each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

Further, in a case where it is alleged that a speech was made containing two or more passages that are seditious, it is fairly open to a trial court to order an acquittal in respect of one passage and yet enter a conviction in respect of the other. Indeed, this is what happened in *Public Prosecutor v. Mark Koding (supra)*, a decision with which we are in complete agreement.

In the present case, the learned trial judge carefully scrutinised the evidence of PW2, 7 and 12 before deciding to act upon it. We are unable to detect any error in the reasoning of the judge when he came to evaluate the credibility of the prosecution witnesses. We would therefore reject the submissions of Encik Karpal Singh on this point.

Consideration Of The Defence

Counsel for the appellant argued that when the trial judge came to consider the defence, he misdirected himself upon the burden of proof that lay on the appellant. Our attention was drawn to passages in the judgment where trial judge had said that the appellant had failed to raise a reasonable doubt as to the truth of the prosecution's case. Encik Karpal Singh submitted that the trial judge ought to have gone further.

With respect, we are unable to agree with this line of argument. In accordance with well-established authority, the trial judge asked himself the right question, namely, whether the appellant had succeeded in casting a reasonable doubt as to the truth of the prosecution's case. This is not a case where the judge had said that he did not believe the appellant and his witnesses. Had he done so, he would been under a further duty to ask himself, whether despite the absence of belief, the appellant had raised a reasonable doubt upon the truth of the prosecution case. In the present instance the learned judge proceeded directly to ask himself the question: has the appellant raised a reasonable doubt as to the truth of the prosecution case? In this the judge was entirely correct.

Appeals Against Convictions: A Summary

For the reasons given, we are of the view that the appellant's appeals against the convictions entered against him upon the first and second charges are without merit. To sum-up, the trial judge was entirely correct in holding that the ingredients of each offence had been proved beyond a reasonable doubt. He asked himself the right questions, directed himself properly on the relevant law and adopted the correct approach in the matter of evidence evaluation. The appeal against conviction upon the first charge is dismissed. So is the appeal against the second charge.

Sentence: Appeal And Cross-Appeal

(A) The Approach

Encik Karpal Singh submitted that the sentence passed upon the appellant in respect of each charge is manifestly excessive. He complained that the learned judge had failed to take into account relevant considerations when passing the sentences in question. According to counsel, the authorities reveal a trend on the part of the courts not to impose a sentence that would disqualify a Member

of Parliament from membership of the Dewan Rakyat. The trial judge did not, Encik Karpal Singh argues, address his mind to this important consideration. In support of his submission counsel relies on the decisions in two cases. The first is the decision of the former Federal Court in *Lim Kit Siang v. Public Prosecutor* [1980] 1 MLJ 293. The second is *Public Prosecutor v. Mark Koding (supra)*.

Lim Kit Siang (ibid) concerned a Member of Parliament who was convicted on five charges under the Official Secrets Act 1972. The High Court fined the appellant RM5,000, in default one year's imprisonment on the first charge, RM1,000, in default two months imprisonment on the second charge and RM3,000 each on the third, fourth and fifth charges. The accused appealed against conviction and sentence. The Public Prosecutor cross-appealed against inadequacy of sentence. The Federal Court dismissed the appeal against conviction. It also dismissed the cross-appeal. However, it allowed the accused's appeal against sentence in respect of the first, third, fourth and fifth charges. It reduced the fine on the first charge to RM1,500 and on the third, fourth and fifth charges to RM1,000. The very special circumstances that moved the Federal Court to intervene in the matter of punishment in that instance are to be found in the following passage in the judgment of Raja Azlan Shah CJ (Malaya) (as he then was) at p. 298 of the report:

> We do not hide from ourselves the fact that the details of the fire control system and of the engines installed in and the capability of the craft are of possible utility to an enemy which seeks to destroy our naval defence and if such information had tended to endanger or had the effect of imperilling the security of the country, we would have interfered by substituting a sentence of imprisonment for any fine that might have been imposed. But one has to be realistic and see the case in its correct perspective and in the context of prevailing conditions. We could not but wonder whether the details provided in calling for tenders for the guns, missiles and launchers, available to anyone who applied for a tender form, had not largely removed the veil of secrecy from the ships' armaments. Also no one has suggested in any way that the information in the charges was useful to such enemies as this country has at the moment or in the foreseeable future. Neither has anyone submitted that the real intention or the effect of such revelation was to benefit the enemy or endanger the security of the country. This is particularly true of the disclosure of the tender exercise and the financial provisions of the final contract.

Mark Koding (ibid) also concerned a Member of Parliament who was convicted of an offence under s. 4(1)(b) of the Sedition Act. He was bound over for good behaviour. The circumstances warranting the sentence passed in that case appear in the following passage of the judgment of Mohamed Azmi J at p. 117 of the report:

On sentence, I have given anxious consideration to the various extenuating circumstances found in this case. Although sedition is a serious offence, I take into consideration that the Accused is a first offender, and the type of sedition committed is a technical one under para. (f) of s. 3(1). Further, there are extenuating circumstances in this case which are in accused's favour. Although the accused is a lawyer and a Member of Parliament who should be presumed to know the law, it is clear from the Malaysian Hansards that when the accused made the impugned speech even the Speaker, from his interjection when Mr Pathmanaban took objection, was understandably unsure whether to stop or allow the Accused to continue with his speech. The law of sedition in this country is difficult to understand due to its artificial nature, and until recently even a Member of Parliament could not be expected to know why his freedom of speech has been validly limited although ss. 3 and 8 of the Houses of Parliament (Privileges and Powers) Ordinance 1952 have not been expressly repealed. Secondly, this offence was committed in 1978 and the accused was only charged in 1981 after the Deputy Public Prosecutor had given his consent to prosecute some two years and nine months after a police report was lodged by the complainant. Thirdly, this is the first case in this country that a Member of Parliament has been charged of committing the offence while discharging his duty in Parliament. Fourthly, the impugned speech was accused's maiden speech in Parliament. In my view, the fact that the accused has been found guilty in this case, is sufficient deterrent for him and other Members of Parliament to be more careful in future when giving speeches in Parliament, particularly when dealing with sensitive issues. To my mind, public interest would be sufficiently served if the accused is put on a Bond for two years in the sum of $2,000 in one surety to be of good behaviour under s. 173A Criminal Procedure Code without recording a conviction. I therefore impose the sentence which I think is fair and adequate having regard to all the circumstances of the case. **However, this sentence should not form a precedent for future cases involving Members of Parliament who are found guilty of similar offences.** (Emphasis added.)

With respect, the cases relied upon by counsel do not constitute a trend of authority in support of a judicial policy on sentencing in favour of Members of Parliament, whether they occupy Government or Opposition benches in the Dewan Rakyat. They are nothing more than decisions upon their peculiar facts. In our judgment the status of Members of Parliament is in itself of no consequence to set that class of persons apart from ordinary citizens in the matter of sentencing. If a serious offence is committed by a Member of Parliament, then it is the plain duty of a court to impose such punishment as reflects the gravity of the matter. Any other approach would fetter the discretion vested in a court to impose a sentence appropriate to the facts and circumstances of a particular case.

The principles governing sentencing have been stated on numerous occasions and we think no assistance is to be had by going through all the authorities on the subject. Suffice to say that a court should, when sentencing an accused, take into account all considerations relevant to the case, including the gravity of the offence, the circumstances surrounding the commission of the offence, the antecedents of the accused, the deterrent effect that punishment is to have, any factor that warrants special attention either in favour or against the accused and above all the public interest. Reasons must be given for imposing a particular sentence to enable an appellate court to ensure that there has been no error in principle.

In *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256, 257, Hashim Yeop A. Sani J, (later CJ, (Malaya)) admirably expressed the correct psychological approach to sentencing as follows:

> Presidents and magistrates are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witnesses with authority. The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. **This in my view is a wrong approach.** The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused. Lord Goddard LCJ in *Rex v. Grondkowski* [1946] 1 All ER 560, 561 offered some good advice when he said:-
>
> > The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners. (Emphasis added.)

It is with the foregoing matters in mind that we approach the appeals and cross-appeals on sentence.

(B) The First Charge

To recall, the appellant was sentenced to a fine of ten thousand ringgit, in default six months imprisonment on the first charge. The learned judge, however, did not give any reasons for imposing this punishment.

It is the appellant's contention that this sentence is excessive. His counsel has said that the fine should be reduced to prevent disqualification of his client from membership of the Dewan Rakyat. On the other hand, Encik Yusof Zainal Abidin, the deputy who argued the cross-appeal in respect of the first charge submitted that the sentence passed is grossly inadequate. He has submitted that the appellant ought to have received a custodial sentence instead of a fine.

Now, a person convicted of an offence under s. 8A of the PPPA is, according to that provision, liable to imprisonment for a term not exceeding three years or to a fine not exceeding twenty thousand ringgit or to both such imprisonment and fine. The section is constructed so as to place imprisonment as the first option of punishment for an offender. This clearly reflects the gravity of the offence created by the section.

Parliament's aim in enacting the provision was obviously to ensure truth in publication of news and providing severe penal consequences for those who publish false news maliciously. It is a serious thing in itself to publish false news. The seriousness of the matter is compounded when the publication is malicious. Those possessed with the power to influence public opinion bear a heavy responsibility to ensure that they do not mislead the general public because of the grave consequences that may ensue by reason of what they publish. The malicious publication of false news by people who wield considerable influence over public opinion can destroy the equilibrium of society and cause untold harm and injury to the peace and security of this country. In these circumstances it is the plain duty of the courts to impose a sentence that brings home the seriousness with which the law views such criminal conduct.

Accordingly, we are of opinion that there is no merit in the appellant's complaint that the sentence passed on him is excessive. However, we are in entire agreement with the submission of Encik Yusof, the learned deputy, that the sentence imposed by the judge is manifestly inadequate in the circumstances of the case. As pointed out by the learned deputy, the judge did not take into account the serious nature of the offence. Neither did he address his mind to the public interest. Further, he did not say why he thought a fine more appropriate when the statute provided imprisonment as the first choice. Indeed, the learned judge gave no reasons whatsoever for imposing the sentence he did. There is therefore merit in the argument advanced on the behalf of the Public Prosecutor that the judge erred in principle. Hence we are satisfied that this case demands appellate interference in the matter of sentence.

In our judgment the imposition of a fine on the appellant, having regard to all the circumstances of the case, is a mere tap on the wrist because it plainly lacks any deterrent effect. Taking into account all the circumstances of the case, including the seriousness of the offence and the requirement of deterrence, and after striking a balance between the interests of the public and the interests of the appellant, we came to the conclusion that a term of eighteen months imprisonment would be the appropriate sentence to be passed upon the appellant. We sentenced the appellant accordingly upon the first charge.

(C) The Second Charge

We now turn to deal with the appropriateness of the punishment meted out by the judge in respect of the second charge.

In *Public Prosecutor v. Mark Koding (ibid)* Mohamed Azmi J, (as he then was) described sedition as a serious offence. We agree. In the present instance, the appellant had expressed his views upon the matter in Parliament and had asked the questions about it. If he was dissatisfied with the replies he received on the floor of the house, there were courses open to him as a member of the Dewan Rakyat acting within the bounds of law. Instead of pursuing his parliamentary remedies, he set himself upon a course that was plainly unlawful. He acted with purpose and after due deliberation at the meeting held in December 1994. He had in his possession the true facts of the case concerning the minor. Yet he portrayed to those present at the meeting of 19 January 1995 a picture materially at variance with the truth. In the light of all the evidence available on record we are unable to accede to Encik Karpal Singh's suggestion that the appellant was merely discharging his public duty as a Member of Parliament when he uttered the offending words.

On the evidence adduced, it is clear that the words uttered by the appellant at the meeting of 19 January 1995 were seditious. The appellant has not sought to argue otherwise. The learned deputy argued that it is a serious thing to launch an unwarranted attack upon the judiciary. With this submission we are in agreement.

It is of vital importance that the public enjoy confidence in the administration of justice of which the courts form an integral part. Speeches or publications that bring the administration of justice into hatred or contempt produce a serious consequence. For, they have the effect of destroying public confidence in one of the pillars of the democratic system of government. It is in recognition of this harm that Parliament enacted s. 3(1)(c) of the Sedition Act.

The seriousness with which the law treats allegations of partiality and bias on the part of those entrusted with the administration of justice is well illustrated by *Re Sarbadhicary* [1906] 95 LT 894 where an article published by a barrister that included the following passage:

> So our readers can easily see that we have a wonderful chief justice who punishes an assailed and not an assailant with miraculous readiness and activity. He punishes not the wrongdoers, but the wronged and thus he upholds justice.

was held by the Privy Council to be a contempt of court. Sir Andrew Scoble who delivered the advice of the Board observed (at p. 895 of the report) that:

> [I]t is essential to the proper administration of justice that unwarranted attacks should not be made with impunity upon judges in their public capacity ...

We pause for a moment to observe the similarity in the language used by the advocate in the above-quoted case and that employed by the appellant in the present instance.

We are not for a moment saying that no criticism of a court is ever possible. It is not judicial policy to muzzle criticism of judges or their judgments, and we would, in this context merely echo what was said in *Hock Hua Bank (Sabah) Bhd. v. Yong Liuk Thin & Ors* [1995] 2 MLJ 213, 222:

> Criticism of a judge is part of the territory in which he operates. So long as that criticism is made *bona fide*, based on fact and in conformity with law, none, least of all a judge, should mind: for there is no acquisition of knowledge without criticism. Over-sensitivity to criticism may result in ignorance, or much worse, intellectual arrogance. To decide a point in fear of criticism is to abdicate duty. These are matters that form part of a well-recognised judicial philosophy and should require no reiteration.

It is only when criticism exceeds its legitimate bounds and becomes proscribed conduct that the courts will intervene. Whether particular conduct falls within the parameters of permissible criticism or has crossed the line to become criminal conduct depends upon the facts of each case.

To return to the case before us, we find merit in the criticism by Encik Azahar of the learned judge's approach to the question of sentence passed upon the appellant in respect of the second charge. It would appear that the learned judge did not sufficiently appreciate the seriousness of the offence committed by the appellant. The fine of RM5,000, in default three months imprisonment imposed by the learned judge is in our view, for the reasons already given, grossly inadequate. It follows that the appellant's appeal against sentence must fail.

True, that s. 4 of the Sedition Act provides for a fine in priority to a term of imprisonment as punishment. But that is not to say that a court ought never to send a person to prison for sedition. It all depends on the facts of each case. Having regard to the facts of this case, we came to the conclusion that the sentence imposed by the judge must be set aside in favour of a term of imprisonment of 18 months from 1 April 1998.

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Conclusion

In the result, the appellant's appeals against conviction and sentence were dismissed. The cross-appeals of the respondent were allowed. The appellant was sentenced to 18 months imprisonment on each charge. Taking into account all the circumstances of the case, in particular the fact that the subject matter of the first and second charges are closely connected and form part and parcel of the same transaction, we came to the conclusion that the sentences of imprisonment should run concurrently and we so ordered. On the application of counsel for the appellant, opposed by the learned deputy, the appellant was granted bail pending appeal to the Federal Court.

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Before concluding, we wish to record our appreciation to counsel on both sides of the Bar. Encik Karpal Singh, as well as Encik Azahar and Encik Yusof argued these appeals with their usual ability. Their research and presentation of their respective cases made light the burden placed upon us in our deliberations of this case.

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